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Fair Trial and Free Press—Washington Conditions Media Access to the Courtroom—Federated Publications, Inc. v. Swedberg, 96 Wn. 2d 13, 633 P.2d 74 (1981), cert. denied, 102 S. Ct. 2257 (1982)

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FAIR TRIAL AND FREE PRESS—WASHINGTON CONDITIONS MEDIA ACCESS TO THE COURTROOM—*Federated Publications, Inc. v. Swedberg*, 96 Wn. 2d 13, 633 P.2d 74 (1981), *cert. denied*, 102 S. Ct. 2257 (1982).

In *Federated Publications, Inc. v. Swedberg*,¹ the Washington Supreme Court held that a trial court could impose “reasonable conditions” on press attendance at a pretrial suppression hearing.²

During a prosecution for attempted murder,³ the trial judge determined that detailed reporting of the pretrial suppression hearing would jeopardize the defendant’s right to a fair trial. Judge Swedberg therefore conditioned the media’s attendance on their agreement to abide by the 1974 Washington State Bench-Bar-Press Guidelines.⁴

Federated Publications, publisher of the *Bellingham Herald*, refused to sign the agreement and refused to allow its reporters to attend solely in a nonprofessional capacity.⁵ It argued that conditioning media attendance on compliance with the Bench-Bar-Press Guidelines constituted a prior restraint and that the trial judge exceeded his power by excluding non-signing media representatives.⁶ The Washington Supreme Court disagreed, holding that the order was a permissible access restriction.

This Note first examines the legal background of the doctrine of prior restraint, access to the courtroom, and the development of the Bench-Bar-Press Guidelines. It argues that the Washington Supreme Court erroneously characterized the trial court’s order as an access restriction instead of a prior restraint. Finally, this Note proposes an alternative approach for situations where the trial court faces a substantial likelihood of prejudicial publicity. This alternative approach suggests that procedural safeguards should be exhausted before the trial court imposes any access restrictions.

1. 96 Wn. 2d 13, 633 P.2d 74 (1981), *cert. denied*, 102 S. Ct. 2257 (1982).

2. *Id.* at 22, 633 P.2d at 78.

3. The defendant was Veronica Compton, who proclaimed herself to be the girlfriend of Kenneth Bianchi, the “Hillside Strangler.” Both Compton’s and Bianchi’s alleged crimes were the subjects of extensive publicity. *Id.* at 15, 633 P.2d at 74; *State v. Bianchi*, 92 Wn. 2d 91, 593 P.2d 1330 (1979).

4. 96 Wn. 2d at 15, 633 P.2d at 75. The Bench-Bar-Press Guidelines are a voluntary code of conduct to guide the bench, bar, and press in reporting various proceedings. STATEMENT OF PRINCIPLES AND GUIDELINES OF THE BENCH-BAR-PRESS COMMITTEE OF WASHINGTON 1 (1972) [hereinafter cited as BENCH-BAR-PRESS GUIDELINES]. See discussion at § 1B3 *infra*.

5. 96 Wn. 2d at 15, 633 P.2d at 75.

6. *Id.* at 18, 633 P.2d at 76.

I. LEGAL BACKGROUND

The fair trial-free press conflict⁷ is rooted in the need to preserve the defendant's sixth amendment⁸ right to an impartial jury while providing the public with access to and information about criminal proceedings. Public access is constitutionally mandated in certain circumstances.⁹ The first amendment¹⁰ requires courts to allow the media to report on proceedings, once access is granted.¹¹ Nevertheless, the defendant's interests are also important and, often, constitutionally protected. One protected interest is the right to an impartial jury.¹² Extensive publication of prejudicial information may result in the impanelling of biased jurors, the denial of due process, and the consequent need to reverse convictions.¹³

7. The fair trial-free press conflict has been the subject of extensive commentary. See, e.g., A. FRIENDLY & R. GOLDFARB, *CRIME AND PUBLICITY* (1967); THE TWENTIETH CENTURY FUND TASK FORCE ON JUSTICE, *PUBLICITY AND THE FIRST AMENDMENT, RIGHTS IN CONFLICT* (1976); Stephenson, *Fair Trial-Free Press: Rights in Continuing Conflict*, 46 BROOKLYN L. REV. 39 (1979). For a bibliography of literature on the fair trial-free press conflict, see D. FRETZ, *COURTS AND THE NEWS MEDIA* 139-43 (1977).

8. The sixth amendment states in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed" U.S. CONST. amend. VI.

9. See *Globe Newspaper Co. v. Superior Court*, 102 S. Ct. 2613 (1982); *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980); see also text accompanying notes 17-26 *infra*.

10. "Congress shall make no law . . . abridging the freedom of speech, or of the press" U.S. CONST. amend. I.

11. See *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (order prohibiting publication of name and picture of juvenile obtained during open hearing violated first amendment); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 549, 568 (1976) (order prohibiting publication of evidence offered at an open preliminary hearing violated "settled [first amendment] principles"); *Craig v. Harney*, 331 U.S. 367, 374 (1947) ("What transpires in the court room is public property . . . Those who see and hear what transpired can report it with impunity."); *State ex rel. Superior Court v. Sperry*, 79 Wn. 2d 69, 483 P.2d 608, *cert. denied*, 404 U.S. 939 (1971). See also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (state could not impose sanctions on the press for publication of rape victim's name that was discovered in public court records).

12. See U.S. CONST. amend. VI.

13. Early U.S. Supreme Court cases upheld convictions despite extensive publicity. E.g., *Stroble v. California*, 343 U.S. 181 (1952). *Stroble* involved widespread pretrial publicity including the district attorney's release of a confession and public announcement that the defendant was guilty and sane. The Court refused to find a due process violation in the absence of a showing of actual prejudice. *Id.* at 198. Cf. *Rideau v. Louisiana*, 373 U.S. 723 (1963) (the Court found a denial of due process without a finding of actual prejudice when the trial judge refused to grant a change of venue following broadcast of an "interview" in which the defendant confessed to the sheriff).

The Supreme Court has reversed convictions, however, when pretrial publicity resulted in actual prejudice. In *Marshall v. United States*, 360 U.S. 310 (1959), the Court set aside a federal conviction because of prejudicial publicity that occurred when seven jurors saw published reports of the defendant's prior convictions. Two years later the Court for the first time overturned a state conviction because of prejudicial publicity. In *Irvin v. Dowd*, 366 U.S. 717 (1961), pretrial publicity resulted in eight of twelve jurors stating during voir dire that they thought the defendant was guilty. The Court stated that the standard for determining jury impartiality required only that the juror be able to "lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* at

Several means are available to protect a defendant's right to a fair trial from possibly prejudicial publicity. Courts may control judicial proceedings by closing pretrial hearings, changing venue, conducting intensive voir dire, and imposing "gag orders"¹⁴ to limit comments by attorneys, court personnel, and law enforcement officials.¹⁵ Courts may also control publication of information by contempt proceedings and possibly, under current doctrine, by prior restraints.¹⁶ The media may restrict its own publication by adhering to voluntary guidelines. The following section examines the utility, practicality, and constitutionality of access restrictions, prior restraints, and voluntary guidelines.

A. Controlling Access to the Proceedings

Closing pretrial proceedings prevents dissemination of potentially prejudicial information. The United States Supreme Court considered the right of the public¹⁷ to attend judicial proceedings in *Gannett Co. v. De-*

722-23. The Court found that this standard had not been met because of the "continued adverse publicity" before trial. *Id.* at 726. See also *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (holding that prejudicial publicity prevented a fair trial).

Further enunciation of the standard for jury impartiality came in *Murphy v. Florida*, 421 U.S. 794 (1975), in which the Court affirmed a conviction despite extensive pretrial publicity. The Court, quoting *Irvin*, stated that the defendant must show an "actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality." *Id.* at 800 (quoting *Irvin v. Dowd*, 336 U.S. 717, 723 (1961)). Cf. *Estes v. Texas*, 381 U.S. 532 (1965) (televising of proceedings denied defendant due process). But cf. *Chandler v. Florida*, 449 U.S. 560 (1981) (televising of proceedings did not, by itself, deny defendant due process).

The Court has recently declined to review claims of denial of fair trials resulting from prejudicial publicity. See *The News Media and the Law*, Feb.-Mar. 1982, at 39-40. For a review of the Supreme Court's treatment of prejudicial publicity claims, see Portman, *The Defense of Fair Trial from Sheppard to Nebraska Press Association: Benign Neglect to Affirmative Action and Beyond*, 29 STAN. L. REV. 393 (1977); Stephenson, *supra* note 7.

14. "Gag orders" have been attacked as violating free speech rights. See, e.g., *Gulf Oil v. Bernard*, 452 U.S. 89 (1981) (trial court abused its discretion in issuing an order limiting communications between attorneys and potential class members); *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) (en banc) (disciplinary rule limiting attorneys' comments upheld in part); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975) (disciplinary rule limiting attorneys' comments must incorporate "serious and imminent threat of interference with the fair administration of justice" standard), cert. denied *sub nom.* *Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976); *Markfield v. Ass'n of Bar of New York*, 49 A.D.2d 516, 370 N.Y.S.2d 82, 85 (1975) (disciplinary rule limiting attorneys' comments during criminal trials must incorporate "clear and present danger to the administration of justice" standard); *Widoff v. Disciplinary Bd.*, 54 Pa. Commw. 124, 420 A.2d 41 (1980) (disciplinary rule limiting attorneys' comments during pendency of administrative hearing held unconstitutional). Analysis of this issue is beyond the scope of this Note.

15. A trial judge could also use a continuance, a severance, peremptory challenges, sequestration and admonitions to the jury to protect the defendant from prejudicial publicity.

16. See discussion at § 1B1 *infra*.

17. The press has no greater right of access than the public. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (Burger, C.J., plurality opinion); *id.* at 16-17 (Stewart, J., concurring in the judgment) (press must be granted "effective" access); *Saxbe v. Washington Post Co.*, 417 U.S. 843,

Pasquale,¹⁸ *Richmond Newspapers, Inc. v. Virginia*,¹⁹ and *Globe Newspaper Co. v. Superior Court*.²⁰

In *Gannett*, the Court held that the public has no sixth amendment right of access to pretrial suppression hearings, reasoning that only the accused can assert the sixth amendment right to a public trial.²¹ *Gannett* generated confusion because the majority opinion failed to distinguish clearly between pretrial proceedings and trials. Clarifying this point in *Richmond Newspapers*, the Court recognized a first amendment right of access to criminal trials.²²

In *Globe Newspaper*, decided after *Swedberg*, the Court held that a Massachusetts law requiring mandatory closure of sex-offense trials during the testimony of a minor victim was unconstitutional.²³ The Court

850 (1974); *Pell v. Procunier*, 417 U.S. 817, 835 (1974). *Pell* and *Saxbe* involved challenges to rules prohibiting media interviews with prisoners. The Court held that because the press was not denied information available to the public, the first amendment was not violated. Justice Powell, dissenting in both cases, argued in *Saxbe* that "[t]he press . . . acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government." 417 U.S. at 863.

In *Houchins*, KQED sued for access to a jail to investigate allegedly shocking conditions. Houchins, the county sheriff, then instituted a monthly tour program limited to groups of 25 persons but prohibited pictures and inmate interviews. The district court granted a preliminary injunction enjoining Houchins from denying the press reasonable access to the jail and from prohibiting inmate interviews. The court of appeals affirmed. In a plurality opinion, the Supreme Court reversed. Three justices followed the majority's position in *Pell* and *Saxbe*. Justice Stevens argued in dissent that although the press has no greater right of access than the public, the injunction was valid because the jail's no-access policy probably violated the first amendment. *Houchins*, 438 U.S. at 19. Justice Stewart, concurring in the judgment, asserted that the press has "equal access" with the public, but that "the concept of equal access must be accorded more flexibility in order to accommodate the practical distinctions between the press and the general public." *Id.* at 16. Thus, the injunction was justified, according to Justice Stewart, insofar as it granted the press more flexible and frequent access and permitted the press to bring cameras into the jail. *Id.* at 18.

18. 443 U.S. 368 (1979).

19. 448 U.S. 555 (1980).

20. 102 S. Ct. 2613, 2619-20 (1982).

21. Justice Stewart, writing for the majority, argued that even if the sixth amendment established a right of access, that right would not extend to pretrial proceedings. These proceedings were traditionally private and often serve to prevent the jury from hearing inadmissible evidence. 443 U.S. at 387-89. Justice Burger, concurring, emphasized the pretrial nature of the proceedings, and asserted that there was no sixth amendment right because pretrial proceedings were not open at common law. *Id.* at 396.

22. 448 U.S. 555 (1980). The justices filed seven separate opinions in *Richmond Newspapers*. Only Justice Rehnquist dissented. Justice Powell took no part in the consideration or decision of the case.

23. 102 S. Ct. 2613 (1982). Justice O'Connor concurred in the judgment, stating that she interpreted both *Richmond Newspapers* and *Globe Newspaper* to be limited to the context of criminal trials. *Id.* at 2623 (O'Connor, J., concurring). Chief Justice Burger, joined by Justice Rehnquist, dissented, arguing that rape trials were historically closed, and that the state's interests overrode the "incidental effects of the law on First Amendment rights." *Id.* at 2625 (Burger, C.J., dissenting). Justice Stevens also dissented, stating that the appeal should have been dismissed because the controversy lacked concreteness and was premature. *Id.* at 2623 (Stevens, J., dissenting).

declared that a state seeking to deny access “in order to inhibit the disclosure of sensitive information”²⁴ must show “that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.”²⁵ The trial court, in considering closure, must make a case-by-case determination of necessity, and must provide the public and press with an opportunity to be heard.²⁶

These Supreme Court decisions do not address the existence of a first amendment right to attend pretrial hearings.²⁷ In *Richmond Newspapers*, Chief Justice Burger and Justice Brennan analyzed the access issue by asking whether the proceeding was “traditionally open to the public.”²⁸ Similarly, in *Globe Newspaper*, Justice Brennan stated that the historical presumption of open criminal trials is an important reason supporting a first amendment right of access to trials.²⁹ And, in *Gannett*, both Justices Stewart and Burger indicated that pretrial hearings would not be treated like trials because pretrial proceedings were not open at common law.³⁰

24. *Id.* at 2620. *Globe Newspaper* involved a minor victim’s testimony rather than prejudicial publicity. It seems, however, that prejudicial information revealed at a pretrial hearing or a criminal trial could also be considered “sensitive.”

25. *Id.*

26. *Id.* at 2621. The state interests asserted were protecting minor victims from further trauma and encouraging victims to come forward and testify. The Court found the former interest compelling but the latter speculative. Though the protection of minors was a compelling interest, the Court held that the interest could be served by a case-by-case determination of the propriety of closure. *Id.*

27. According to one scholar, a majority of the Court appears to support a right of access to pretrial proceedings. Four justices dissenting in *Gannett* supported this right under the sixth amendment. 443 U.S. 368, 406–07 (1979) (Blackmun, J., concurring in part and dissenting in part, joined by Brennan, J., White, J., and Marshall, J.). Justice Stevens characterized the first amendment right of access broadly in *Richmond Newspapers*, indicating his support for a right of access to pretrial proceedings. 448 U.S. 555, 582–84 (1980) (Stevens, J., concurring in the judgment) (first amendment “protects the public and the press from abridgement of their rights of access to information about the operation of their government”). See 2 J. CHOPER, Y. KAMISAR, & L. TRIBE, *THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1979–1980*, at 148–53 (1981).

28. 448 U.S. at 577 (Burger, C.J., plurality opinion); *id.* at 589 (Brennan, J., concurring in the judgment). Justices Stewart and Blackmun also emphasized history in their discussions. *Id.* at 599 (Stewart, J., concurring in the judgment); *id.* at 601 (Blackmun, J., concurring in the judgment).

29. 102 S. Ct. at 2619. Chief Justice Burger, dissenting in *Globe Newspaper*, stated that the majority was ignoring the “traditionally open to the public” test. *Id.* at 2624 (Burger, C.J., dissenting).

30. See note 21 *supra*. Because most modern pretrial proceedings did not exist at common law, historical reliance may be inappropriate in this context. See *Gannett Co. v. DePasquale*, 443 U.S. 368, 437 (1979) (Blackmun, J., concurring in part and dissenting in part). Historical reliance should not be dispositive because values change and historical facts are easily manipulated. *The Supreme Court 1978 Term*, 93 HARV. L. REV. 62, 67 (1979).

In *Gannett*, Justice Blackmun argued that suppression hearings should be open because they function like trials and often determine the outcome at trial. 443 U.S. at 434. The argument that open proceedings promote impartiality and the fair administration of justice applies to pretrial proceedings as well as to trials. *Id.* at 437. Other reasons support a right of access to pretrial proceedings. First, the pretrial hearing has become a vital part of the criminal prosecution because of the exclusionary rule. Second, the tradition of open trials indicates that the public has a compelling interest in observ-

While Justice Brennan emphasized the narrowness of the court's holding in *Globe Newspaper*,³¹ his opinion contains broad language regarding the purpose and implementation of the right of access to criminal trials. He stated, for example, that the first amendment right of access ensures an informed discussion of governmental affairs, "enhances the quality and safeguards the integrity of the factfinding process, . . . fosters an appearance of fairness, . . . [and] permits the public to participate in and serve as a check upon the judicial process."³² Further, Justice Brennan stated that a court must determine the constitutionality of an access restriction by weighing the state interests asserted, not by assessing any historical presumption of openness.³³ Thus, while Justice Brennan emphasized the limitation of the opinion to criminal trials and reiterated the historical rationale for the right of access, his discussion of additional rationales arguably applies to pretrial hearings, and the test of constitutionality focuses on state interests rather than on history.

The right of access may also be controlled by state laws, including constitutional provisions. In *Federated Publications, Inc. v. Kurtz*,³⁴ the Washington Supreme Court found that the public has a qualified right of access to all judicial proceedings. The court based this right on article 1, section 10 of the Washington Constitution, which provides that "[j]ustice in all cases shall be administered openly"³⁵ Nevertheless, the court upheld closure of a pretrial suppression hearing, reasoning that the public's right of access is "not absolute."³⁶ *Kurtz* provides Washington precedent for closure when the public's right of access conflicts with the defendant's right to a fair trial.

ing the administration of justice, an interest that also exists at the pretrial stage. See Note, *Access to Judicial Proceedings: After Gannett and Richmond*, 12 TEX. TECH. L. REV. 663, 693 (1981).

Lower courts have divided on the scope of the public's right of access to pretrial hearings. *E.g.*, *San Jose Mercury-News v. Municipal Court*, 30 Cal. 3d 498, 638 P.2d 655, 179 Cal. Rptr. 772 (1982) (closure of pretrial hearing upheld); *United States v. Edwards*, 430 A.2d 1321 (D.C. App. 1981) (pretrial closure violated first amendment); *Capital Newspapers v. Clyne*, 82 A.D.2d 963, 440 N.Y.S.2d 779 (1981) (proscriptions against closure held inapplicable to hearing on scope of cross-examination about defendant's prior crimes; different considerations would apply to suppression hearings where the public usually has a legitimate interest in attending); *Commonwealth v. Hayes*, 489 Pa. 419, 414 A.2d 318 (pretrial suppression hearing opened when defendant's rights could be protected by selecting and sequestering jury prior to hearing), *cert. denied*, 449 U.S. 992 (1980). See generally *The News Media and the Law*, Feb.-Mar. 1982, at 37-38 (discussing closure cases).

31. 102 S. Ct. at 2622 n.27.

32. *Id.* at 2620. See note 30 *supra* (discussing Justice Blackmun's opinion in *Gannett*).

33. *Globe Newspaper*, 102 S. Ct. at 2619 n.13.

34. 94 Wn. 2d 51, 615 P.2d 440 (1980).

35. WASH. CONST. art. I, § 10 states: "Justice in all cases shall be administered openly, and without unnecessary delay." A number of other states have identical or similar constitutional clauses. *E.g.*, ARIZ. CONST. art. II, § 11; PA. CONST. art. I, § 11.

36. 94 Wn. 2d at 60, 615 P.2d at 445. See also *Cohen v. Everett City Council*, 85 Wn. 2d 385,

In *Seattle Times Co. v. Ishikawa*,³⁷ decided after *Swedberg*, the Washington court embellished the procedure set forth in *Kurtz* for determining the propriety of access restrictions.³⁸ The court noted five elements: (1) the proponent must show a "likelihood of jeopardy" to the defendant's right to a fair trial;³⁹ (2) all opponents must be given an opportunity to object; (3) the court must determine that curtailing access is the least restrictive means available and that it effectively protects the threatened interests;⁴⁰ (4) "[t]he court must weigh the competing interests of the defendant and the public" ⁴¹ and articulate its findings; (5) if a closure order is issued, it "must be no broader in its application or duration than necessary to serve its purpose" ⁴²

B. Controlling the Printing of News About the Proceedings

1. Prior Restraints

A prior restraint prohibits the publication of information already in the publisher's possession. The doctrine of prior restraint limits restriction of publication.⁴³ The focus of the doctrine is temporal: prior restraints are

535 P.2d 801 (1975) (judicial proceedings must be open absent exceptional circumstances); *In re Lewis*, 51 Wn. 2d 193, 316 P.2d 907 (1957) (closure of juvenile proceeding upheld).

37. 97 Wn. 2d 30, 640 P.2d 716 (1982). *Ishikawa* involved a challenge to the closure and sealing of the record of a pretrial hearing. The action arose out of the prosecution of Cynthia Marler for the murder of Wanda Touchstone. The trial judge sealed the record of a pretrial hearing, stating that the action was necessary to protect the defendant's fair trial rights, the ongoing investigation of the murder, and the safety of witnesses. *Id.* at 40, 640 P.2d at 721. The record, which was sealed on February 25, 1981, was opened on May 19, 1982. It contained the defendant's confession and statement to the police concerning who hired her to murder Touchstone. See Suffia, *Facts of Touchstone Murder Remain Marler's Secret*, *Seattle Times*, May 20, 1982, at A11, col. 1.

38. 97 Wn. 2d at 37-39, 640 P.2d at 720-21.

39. *Id.* at 37, 640 P.2d at 720 (quoting *Federated Publications, Inc. v. Kurtz*, 94 Wn. 2d 51, 62, 615 P.2d 440, 446 (1980)). The court explained, "If closure and/or sealing is sought to further any right or interest besides the defendant's right to a fair trial, a 'serious and imminent threat to some other important interest' must be shown. . . . [A]n in camera hearing may be proper when the very argument on closure may jeopardize the defendant's right to a fair trial." *Id.* at 37, 39, 640 P.2d at 720, 721.

40. Where access limitations are requested to protect the defendant's right to a fair trial, the burden of suggesting alternatives is on the opposition. *Id.* at 38, 640 P.2d at 721.

41. *Id.* (quoting *Kurtz*, 94 Wn. 2d at 64, 615 P.2d at 447).

42. *Id.* at 39, 640 P.2d at 721 (quoting *Kurtz*, 94 Wn. 2d at 64, 615 P.2d at 447).

43. See Emerson, *The Doctrine of Prior Restraint*, 20 LAW AND CONTEMP. PROBS. 648 (1955). The historical setting of the doctrine lies in the licensing system adopted in England in the seventeenth century. Under the Licensing Act of 1662, no book or pamphlet could be published without prior government approval. *Id.* at 650; 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 309 (1883). The first amendment, ratified in 1791, was designed in part to prevent the imposition of any system of prior restraint. Emerson, *supra*, at 652. The Supreme Court has also recognized a number of other purposes of the first amendment. *E.g.*, *Whitney v. California*, 274 U.S. 357, 375

considered especially repugnant because they restrict expression before publication. Publication of information in the media's control cannot be barred except under extraordinary circumstances.⁴⁴ A prior restraint is distinct from controlling access to information in the first instance and from imposing punishment after publication. By controlling access, the government denies the media possession of information. By imposing subsequent punishment, the government penalizes publication of information but does not control the content of that publication.

The seminal case on prior restraint in the fair trial-free press context is *Nebraska Press Association v. Stuart*.⁴⁵ In *Nebraska Press*, the United States Supreme Court held unconstitutional a restrictive order prohibiting the publication of any confession made by the defendant and any "other facts 'strongly implicative' of the accused."⁴⁶ Chief Justice Burger, writing for the majority, stated that "any prior restraint on expression comes to the Court with a 'heavy presumption' against its constitutional validity."⁴⁷

To determine the validity of the restrictive order, Burger asked whether "the gravity of the 'evil,' discounted by its improbability, justifies such

(1927) (Brandeis, J., concurring) (freedom of speech necessary for "discovery and spread of political truth").

Both courts and commentators have expounded various rationales for the condemnation of prior restraints. *E.g.*, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (unlike criminal penalties and civil judgments, prior restraints are an "immediate and irreversible sanction"); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973) (communication is suppressed by a prior restraint before an adequate determination that the speech is unprotected by the first amendment); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-31 at 725 (1978) (prior restraints allow the government to destroy the immediacy of the speech and override the publisher's decision of what is newsworthy).

44. Modern prior restraint doctrine is rooted in the Supreme Court's decision in *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). In *Near*, the Court held unconstitutional a statute providing for abatement, as a public nuisance, of any defamatory or scandalous newspaper. *Id.* at 722. The Court stated that the first amendment, intended to prevent the imposition of any system of prior restraint, was limited only in "exceptional circumstances": those involving military secrets, obscene publications, and incitements to violence. *Id.* at 716.

45. 427 U.S. 539 (1976).

46. *Id.* at 545. See also *Phoenix Newspapers, Inc. v. Superior Court*, 101 Ariz. 257, 418 P.2d 594 (1966) (order prohibiting publication of information divulged during open proceeding held invalid); *Sun Co. of San Bernardino v. Superior Court*, 29 Cal. App. 3d 815, 105 Cal. Rptr. 873 (1973) (order prohibiting publication of names and photographs of prisoners scheduled to be called as prosecution witnesses in a murder trial held invalid); *Keene Publishing Corp. v. Cheshire County Superior Court*, 119 N.H. 710, 406 A.2d 137 (1979) (order requiring counsel for newspaper publisher to attend pretrial hearing to advise client concerning what information could be published held invalid); *State ex rel. Superior Court v. Sperry*, 79 Wn. 2d 69, 483 P.2d 608 (order prohibiting publication of information divulged in open court outside presence of jury held invalid), *cert. denied*, 404 U.S. 939 (1971).

47. 427 U.S. at 558 (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971)).

invasion of free speech as is necessary to avoid the danger.”⁴⁸ In applying this test, Burger examined (1) the nature and extent of pretrial news coverage, (2) the probability that other measures would mitigate the effects of unrestrained pretrial publicity, and (3) the likelihood that a restraining order would prevent the threatened danger.⁴⁹ The Court found the restrictive order invalid under these criteria.⁵⁰ The Court also stated that by prohibiting the reporting of evidence adduced at the open preliminary hearing, the order plainly violated settled principles allowing the media to report on any events which occur in an open proceeding.⁵¹

2. Contempt and Collateral Bar

Contempt power becomes important in the fair trial-free press conflict when a court issues an order restricting publication of certain information concerning a judicial proceeding. If the information is published, the publisher may be held in contempt of court.⁵²

The likelihood of contempt is increased by the collateral bar rule. Under this rule, a court order must be obeyed until it is set aside. Violators cannot defend themselves in contempt proceedings by arguing that the order was erroneous or unconstitutional.⁵³ Thus, a publisher faced with a

48. *Id.* at 562. This language was the test used by Judge Learned Hand in *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

49. 427 U.S. at 562.

50. *Id.* at 563. The Court found that the extent of publicity was extremely speculative. *Id.* The availability of alternative remedies such as change of venue, postponement of trial, voir dire, and jury admonitions had not been adequately addressed by the trial judge. *Id.* at 565. Finally, the efficacy of the restrictive order was difficult to predict. *Id.* at 567.

51. *Id.* at 568. *See* note 11 *supra* (discussing media's freedom to publish information divulged during open court proceeding).

52. The British solution to the problem of prejudicial publicity is the broad use of contempt power. A. FRIENDLY & R. GOLDFARB, *supra* note 7, at 141; Evans, *British Law of Contempt Thwarts Speech and Justice*, 52 FLA. B.J. 462 (1978). It can be invoked whenever there is a “reasonable tendency that the administration of justice will be impaired.” Gillmor, *Free Press and Fair Trial in English Law*, 22 WASH. & LEE L. REV. 17 (1965). This general contempt power does not require the existence of a court order. Occurrences in the courtroom may be freely reported, but any commentary on the proceedings is punishable. *Id.* at 23 n.18. Contempt is a criminal offense, subject to summary jurisdiction with a discretionary penalty. As a result, publication of pretrial news is practically nonexistent. Evans, *supra*, at 463.

In *Bridges v. California*, 314 U.S. 252 (1941), the United States Supreme Court held that out-of-court publications were governed by the “clear and present danger” standard for purposes of determining the permissible use of the contempt power. To find a clear and present danger to the administration of justice and a valid basis for contempt, the “substantive evil must be extremely serious and the degree of imminence extremely high.” *Id.* at 263. *See also* *Wood v. Georgia*, 370 U.S. 375 (1972) (same); *Craig v. Harney*, 331 U.S. 367 (1947) (same); *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946) (“For circumstances to create a clear and present danger to judicial administration, a solidity of evidence should be required . . .”).

53. *See* *Walker v. Birmingham*, 388 U.S. 307 (1967). Although the United States Supreme Court upheld the collateral bar rule in *Walker*, it indicated that a “transparently invalid” order could

restrictive order has three alternatives: comply and accept the suppression; obey and appeal the order and lose the timely value of the news; disobey the order and face a contempt proceeding without the defense of error or unconstitutionality.

The Washington Supreme Court refused to apply the collateral bar rule to restrictive orders prohibiting the publication of information about a judicial proceeding in *State ex rel. Superior Court v. Sperry*.⁵⁴ In *Sperry*, a reporter was held in contempt for violating an order prohibiting publication of any proceedings occurring in the absence of the jury. The court held that the order could be collaterally attacked because it was void on its face, not merely erroneous, and reversed the conviction.⁵⁵

3. *Voluntary Guidelines for the Press*

The promulgation of media codes of conduct concerning crimes and publicity began in the 1960's. Much of the impetus for the movement to devise voluntary guidelines came from the Warren Commission's Report

be challenged on constitutional grounds. *Id.* at 315. *See also* United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972) (order prohibiting reporting of evidence taken at hearing held invalid; case remanded to determine appropriateness of contempt in light of order's unconstitutionality); *on remand*, 349 F. Supp. 227 (M.D. La. 1972) (collateral bar rule applied to uphold criminal contempt judgment), *appeal after remand*, 476 F.2d 373 (5th Cir.) (law of the case applied in affirming district court), *cert. denied*, 414 U.S. 979 (1973). *Cf.* Lovell v. Griffin, 303 U.S. 444 (1938) (ordinance requiring permit to distribute literature void on its face; appellant need not seek permit before challenging ordinance).

The scope of the collateral bar rule enunciated in *Walker* is uncertain. While the Court has reaffirmed the *Walker* holding, violators of court orders have successfully raised constitutional defenses in contempt proceedings. *Compare* Vance v. Universal Amusement Co., 445 U.S. 308, 316 n.15 (1980) (injunction must be obeyed even if film is later found to be nonobscene) and GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375, 386 (1980) (injunction issued by a court with jurisdiction must be obeyed until modified or reversed, even if proper grounds to object exist) with Maness v. Meyers, 419 U.S. 449 (1975) (privilege against self-incrimination raised in contempt proceeding following violation of court order to produce evidence) and Branzburg v. Hayes, 408 U.S. 665 (1972) (first amendment defense raised in contempt proceeding following violation of court order to testify). *See* Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 21-22 (1981); *see also* Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 551-58 (1977) (discussing collateral bar rule).

54. 79 Wn. 2d 69, 483 P.2d 608, *cert. denied*, 404 U.S. 939 (1971). *See* Wood v. Goodson, 253 Ark. 196, 485 S.W.2d 213 (1972); State v. Morrow, 57 Ohio App. 30, 11 N.E.2d 273 (1937). *See also* Board of Medical Examiners v. Terminal-Hudson Electronics, Inc., 73 Cal. App. 3d 376, 140 Cal. Rptr. 757 (1977) (collateral bar rule inapplicable when court issuing order lacks jurisdiction); Phoenix Newspapers, Inc. v. Superior Court, 101 Ariz. 257, 418 P.2d 594 (1966) (collateral bar rule inapplicable if court lacks jurisdiction or if order is void). *Cf.* Cooper v. Rockford Newspapers, Inc., 50 Ill. App. 3d 250, 365 N.E.2d 746 (1977) (collateral bar rule held inapplicable because first amendment rights involved and speech posed no actual or imminent threat to the administration of justice).

55. 79 Wn. 2d at 74, 483 P.2d at 611.

on the Assassination of President Kennedy.⁵⁶ The Commission concluded that media coverage of the assassination would have jeopardized Lee Harvey Oswald's right to an impartial jury.⁵⁷ The Commission called on the media and bar to devise standards to control dissemination of potentially prejudicial publicity.⁵⁸

The Bench-Bar-Press Guidelines of Washington are a voluntary code⁵⁹ promulgated by a committee consisting of representatives of the judiciary, the bar, law enforcement, the media, and the University of Washington School of Communications.⁶⁰ The Guidelines cover criminal, grand jury, juvenile, and civil proceedings. They contain a preamble and statement of principles emphasizing the media's responsibility to disseminate accurate information, the need to preserve the right to an impartial jury, and the responsibility of the bench, bar, and press to assure these goals.⁶¹

The guidelines for reporting criminal proceedings note that the impact

56. OFFICIAL WARREN COMMISSION REPORT ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY 239-40 (1964), *quoted in* A. FRIENDLY & R. GOLDFARB, *CRIME AND PUBLICITY* 316-17 (1967).

57. *Id.*

58. The American Bar Association adopted these standards in 1968. AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (Approved Draft, 1968). The committee responsible for developing the standards proposed rules restricting the dissemination of information by attorneys, controlling the release of information by law enforcement personnel, improving courtroom procedures to counteract prejudicial publicity, and imposing contempt sanctions for intentional media interference with jury trials. The committee recommended limited use of contempt power in cases involving the dissemination of information by an individual who knows a criminal trial is in progress and publishes a statement "wilfully designed by that person to affect the outcome of the trial" that "seriously threatens to have such an effect." *Id.* § 4.1. The committee also recommended the use of the contempt power where information is improperly disseminated by law enforcement personnel and judicial employees. *Id.* §§ 2.1, 2.3. The ABA standards have since been revised. AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ASSOCIATION COMMUNICATIONS, THE RIGHTS OF FAIR TRIAL AND FREE PRESS: THE AMERICAN BAR ASSOCIATION STANDARDS app. I (1981). The new standards recommend the use of the contempt power against a person who, knowing a criminal jury trial is in progress or that a jury is being selected, publishes a statement which "(i) is beyond the public record of the court; (ii) is intended by that person to influence the jury's determination of guilt or innocence; and (iii) creates a clear and present danger of having that effect." *Id.*, Standard 8-4.1. The contempt power may also be used when a person "knowingly violates a valid judicial order not to disseminate specified information" referred to in a sealed record or a closed judicial proceeding. *Id.* If a representative of the news media receives information through the misconduct of another, the representative will not be subject to contempt for the dissemination of the information. *Id.*, Standard 8-4.2.

59. The Guidelines do not have the force of law. *State v. Stiltner*, 80 Wn. 2d 47, 52, 491 P.2d 1043, 1046 (1971) (dictum); *Federated Publications, Inc. v. Swedberg*, 96 Wn. 2d 13, 21, 633 P.2d 74, 78 (1981) (dictum). *See also* *State v. Allen*, 73 N.J. 132, 373 A.2d 377, 381 (1977) (New Jersey's Statement of Principles and Guidelines for the Reporting of Criminal Procedures has no binding effect).

60. BENCH-BAR-PRESS GUIDELINES, *supra* note 4, at 1. The Guidelines are representative of similar codes promulgated in other states. *See, e.g.,* *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 613-17 (1976) (setting out Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation).

61. BENCH-BAR-PRESS GUIDELINES, *supra* note 4, at 2-3.

of prejudicial publicity is greatest at the pretrial stage.⁶² Information considered "appropriate" for publication includes the defendant's name, biographical facts, the substance of the charge, and the "circumstances immediately surrounding an arrest."⁶³ Although information derived from open judicial proceedings can be freely reported, publishers are to consider the dangers of prejudice in disclosing before-trial information that "tends to create dangers of prejudice without serving a significant law enforcement or public interest function."⁶⁴

II. THE OPINION OF THE COURT

The *Swedberg* court held that the trial judge's order did not constitute a prior restraint on freedom of expression because "[t]here was no prohibition of publication or other communication of events which transpired in the courtroom."⁶⁵ The court relied on its earlier decision in *Federated Publications, Inc. v. Kurtz*,⁶⁶ which held that the public has a qualified right of access to pretrial hearings under the state constitution's administration of justice clause.⁶⁷ Under *Kurtz*, the trial court may order closure if an open hearing is reasonably likely to prejudice the defendant's right to a fair trial and no available or acceptable alternatives to closure exist.⁶⁸ The majority in *Swedberg* discussed several alternatives to closing the hearing or imposing conditions on press attendance: continuance, severance, change of venue or venire, voir dire, peremptory challenges, jury sequestration and jury admonitions.⁶⁹ The majority found these proposals inadequate.⁷⁰

62. *Id.* at 3.

63. *Id.* at 4.

64. *Id.* at 4-5.

65. *Federated Publications, Inc. v. Swedberg*, 96 Wn. 2d 13, 19, 633 P.2d 74, 77 (1981). *cert. denied*, 102 S. Ct. 2257 (1982).

66. 94 Wn. 2d 51, 615 P.2d 440 (1980). *See* text accompanying notes 26-27 *supra*.

67. WASH. CONST. art. I, § 10. *See* note 35 and text accompanying notes 34-42 *supra*.

68. *Kurtz*, 94 Wn. 2d at 62-64, 615 P.2d at 446-47.

69. *Swedberg*, 96 Wn. 2d at 16-17, 633 P.2d at 75.

70. *Id.* at 17-18, 633 P.2d at 75-76. The court stated why it believed the alternatives were inadequate. A continuance would delay the trial, interfering with the accused's right to a speedy trial and with the public's interest in the expeditious administration of justice. Severance is an available alternative only when there is more than one defendant. A change of venue requires the defendant to waive the right to be tried by a jury in the district where the offense occurred. A change of venire is often unlikely to yield a jury which has not been exposed to publicity. Intensive voir dire may be effective in revealing juror bias, but there remains the possibility that jurors may be unaware of or unwilling openly to admit their biases. In addition, intensive voir dire may create jury resentment toward the client of the attorney who pursues it. Sequestration is an ineffective remedy for pretrial publicity because the jury has not yet been impaneled. Finally, jury instructions may emphasize to the jurors the very prejudicial publicity they are admonished to disregard. *Id.*

The court reasoned that the trial judge's power under *Kurtz* to close the hearing, absent acceptable alternatives, included the power to "impose reasonable conditions upon attendance."⁷¹ In *Swedberg*, the trial judge found that only closing the hearing or conditioning attendance upon the signing of the agreement effectively protected the defendant's rights. The court found further support for the condition by characterizing it as a reasonable " 'time, place, and manner' " restriction on access to judicial proceedings.⁷² Although the court did not decide whether a violation of the order would result in contempt, it emphasized that the Bench-Bar-Press Guidelines represented a "nonobligatory" moral commitment "not enforceable in a court of law."⁷³

Four justices dissented, arguing that the trial court's order constituted a prior restraint.⁷⁴ Writing for the dissenters, Justice Dolliver noted that the trial judge made only "conclusory statements" when weighing the competing interests of the public and the defendant.⁷⁵ The dissent concluded that the trial judge therefore failed to meet both the closure requirements set forth in *Kurtz* and the burden of justification for a prior restraint.

III. ANALYSIS

The *Swedberg* majority analyzed the trial court's order as a restriction on access to the courtroom. They upheld this restriction as a permissible limitation on access under *Kurtz*.⁷⁶ The dissent, in contrast, characterized the order as a prior restraint restricting the use of information obtained during the pretrial hearing.⁷⁷

This section argues that the trial court's order fails under either an access restriction or prior restraint analysis, and argues that the order is unconstitutionally vague. It concludes that the Washington Supreme Court's resolution of the issue is self-contradictory and forces the media to relinquish the protection traditionally accorded to use of information in order to gain access to proceedings. It suggests, instead, an alternative approach that incorporates the guidelines set forth in *Seattle Times Co. v. Ishikawa*.⁷⁸

71. *Id.* at 22, 633 P.2d at 78 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 n.18 (1980)).

72. *Id.*

73. *Id.* at 21-22, 633 P.2d at 78.

74. *Id.* at 26, 633 P.2d at 81 (Dolliver, J., dissenting).

75. *Id.* at 28, 633 P.2d at 82.

76. *Swedberg*, 96 Wn. 2d at 23, 633 P.2d at 78.

77. *Id.* at 27, 633 P.2d at 81 (Dolliver, J., dissenting).

78. 97 Wn. 2d 30, 640 P.2d 716 (1982).

A. *The Legality of the Trial Court's Order*

1. *The Trial Court's Order as an Access Restriction*

Even if one accepts the *Swedberg* court's characterization of the trial court order as an access restriction, the order failed to meet the criteria articulated in *Federated Publications, Inc. v. Kurtz*.⁷⁹ Under *Kurtz*, the trial judge must weigh the competing interests of the defendant and the public. The trial judge in *Kurtz* issued findings concerning the prejudicial nature of the evidence sought to be suppressed, the prior publication of prejudicial ballistics evidence, and the newspaper circulation in the county where the trial was held.⁸⁰ In *Swedberg*, however, the trial judge made no such findings.⁸¹ The majority stated that "[t]he trial judge undoubtedly had . . . in mind" the problems involved in using alternatives such as continuance and jury admonitions.⁸² This statement was unfounded. Judge *Swedberg* made no findings regarding these alternatives and failed to weigh properly the competing interests of the defendant and the public.

Factual findings help assure reasoned decisionmaking. The *Kurtz* court emphasized the careful analysis that the trial judge had employed before deciding to close the hearing. Because the *Swedberg* court held that the power to close the hearing includes the power to impose reasonable conditions, it should have required the trial judge to support his order with factual findings. The *Swedberg* court's failure to require factual findings encourages the arbitrary exercise of this power.

In addition, the *Swedberg* court's characterization of the condition as a valid time, place, and manner restriction⁸³ was erroneous. The court relied on Chief Justice Burger's statement in *Richmond Newspapers* that

79. 94 Wn. 2d 51, 615 P.2d 440 (1980). The procedure for issuing orders restricting access to proceedings was restated in *Seattle Times Co. v. Ishikawa*, 97 Wn. 2d 30, 640 P.2d 716 (1982). See notes 34-40 and accompanying text *supra*. Arguably, *Ishikawa* mitigates the effect of *Swedberg* by requiring the trial judge to consider alternatives and articulate findings when deciding whether to enter a restrictive order. *Id.* at 37-39, 640 P.2d at 720-21. See Miletich, *Courts, Media Clash over Criminal Trial Publicity*, *Seattle Post-Intelligencer*, Mar. 21, 1982, at B8, col. 6. Subsequent to the *Ishikawa* decision, however, *Swedberg*'s effect was evidenced by a motion for a *Swedberg*-type order in the Charles Campbell murder case. Johnston, *News Curbs to be Asked in Campbell Murder Trial*, *Seattle Times*, May 26, 1982, at B1, col. 8. The motion was denied but the judge stated that if it was later shown that the Bench-Bar-Press Guidelines were being violated, he would not "hesitate to issue such an order." Johnston, *Judge in Clearview Murder Trial Disallows Press Curbs*, *Seattle Times*, May 28, 1982, at A22, col. 2.

80. *Kurtz*, 94 Wn. 2d at 62-65, 615 P.2d at 440.

81. "[T]here is nothing in the record, nor an allegation or showing to the trial judge, that any of the news coverage of the case had been or was likely to become sensational in nature" *Swedberg*, 96 Wn. 2d at 27, 633 P.2d at 82 (Dolliver, J., dissenting).

82. 96 Wn. 2d at 18, 633 P.2d at 76.

83. *Id.* at 22, 633 P.2d at 78.

reasonable time, place, and manner restrictions may be used by the trial judge to limit access to trials.⁸⁴ The *Swedberg* court incorrectly interpreted this statement and misapplied the time, place, and manner doctrine. Acceptable restrictions contemplated by the Chief Justice are those preserving the order and quiet of the courtroom.⁸⁵ Valid time, place, and manner restrictions may not be based on the content of the speech.⁸⁶ Because the Guidelines refer to types of communication,⁸⁷ the condition was not a valid access limitation.

2. *The Trial Court's Order as a Prior Restraint*

The *Swedberg* dissent correctly labeled the trial court order as a prior restraint. The form and effect of the agreement presented by the trial court contradicts the majority's assertion that there was no prior restraint.⁸⁸ The form stated, in part, "I agree to follow the Bench-Bar-Press Guidelines in any reporting of the proceedings . . . I am authorized to bind my news agency to follow the Bench-Bar-Press Guidelines."⁸⁹ An agreement which "binds" the signatory, incorporated into a court order, creates a legal obligation. It is not merely a voluntary, moral pact.

This legal obligation constitutes a prior restraint because it is a government order attempting to control the publication of disclosures made during otherwise open judicial proceedings. The content of the legal duty created by the order is determined by the Guidelines. For example, the

84. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 n.18 (1980) (Burger, C.J., plurality opinion). The *Swedberg* court incorrectly attributed this statement to Justice White. 96 Wn. 2d at 22, 633 P.2d at 78.

85. *Richmond Newspapers*, 448 U.S. at 581 n.18. For example, one case cited by Chief Justice Burger was *Illinois v. Allen*, 397 U.S. 337 (1970), which emphasized the importance of maintaining decorum in the courtroom. *Id.* at 346. The Chief Justice also noted that courtroom space limitations may require the provision of preferential seating for the media. *Richmond Newspapers*, 448 U.S. at 581 n.18. Justices Brennan and Stewart also acknowledged the need to maintain decorum. *Id.* at 598, 600. *See also* *Globe Newspaper Co. v. Superior Court*, 102 S. Ct. 2613, 2620 n.17 (1982) (strict scrutiny inapplicable to time, place, and manner restrictions).

86. *E.g.*, *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 648 (1981); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 536 (1980). Other considerations in evaluating time, place, and manner restrictions include: (1) whether the restriction vests arbitrary authority in the government, creating the possibility of discrimination, *see* *Shuttlesworth v. Birmingham*, 394 U.S. 147, 153 (1969); (2) whether the restriction leaves open adequate alternative channels of communication, *Heffron*, 452 U.S. at 648 (1981); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); (3) whether the expression is compatible with the normal activity of the area, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 75 (1981); *Grayned v. Rockford*, 408 U.S. 104, 116–17 (1972); and (4) whether the state interest asserted is sufficiently important to justify the imposition on free speech, *Heffron*, 452 U.S. at 649.

87. *See, e.g.*, text accompanying note 63 *supra*.

88. "There was no prohibition of publication . . . of events which transpired in the courtroom." *Federated Publications, Inc. v. Swedberg*, 96 Wn. 2d 13, 19, 633 P.2d 74, 77 (1981).

89. *See id.* at 26–27, 633 P.2d at 81.

Guidelines state that "[t]he release of certain types of information [including ballistics test results] tends to create dangers of prejudice without serving a significant law enforcement or public interest function."⁹⁰ In *Federated Publications, Inc. v. Kurtz*,⁹¹ the court noted that the trial judge had found that the petitioning newspaper had twice violated the Guidelines by publishing ballistics evidence after an express request from the court to refrain.⁹² A reporter looking to the *Kurtz* decision for guidance in interpreting Judge Swedberg's order reasonably might conclude that publication of information encompassed by the Guidelines' category of "tending to create dangers of prejudice" would violate the order and lead to a contempt citation.⁹³ Because the order restricted publication of information in the media's control, its validity should have been tested under the *Nebraska Press*⁹⁴ rule.

Under the *Nebraska Press* rule, the trial court order was unconstitutional. Although the test adopted by the Supreme Court in *Nebraska Press* is widely thought to represent the low point in first amendment protection,⁹⁵ its application by Chief Justice Burger severely limits the situations in which restrictive orders will be upheld.⁹⁶ The *Swedberg* court only superficially considered the factors Burger used in applying the test.⁹⁷

The first factor to be examined under the *Nebraska Press* test is the nature and extent of pretrial publicity. The court in *Swedberg* accepted

90. BENCH-BAR-PRESS GUIDELINES, *supra* note 4, at 4-5.

91. 94 Wn. 2d 51, 615 P.2d 440 (1980).

92. *Id.* at 63, 615 P.2d at 446-47.

93. The reporter is well advised either to refrain from publication or to attack the order directly. Because it is impossible to predict whether a court will hold the order to be void on its face, merely erroneous, or valid, the reporter cannot know whether constitutional defenses will be lost if the order is collaterally attacked. See text accompanying notes 54-55 *supra* (discussing collateral bar rule in Washington).

94. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). See notes 43-51 and accompanying text *supra* (discussing *Nebraska Press*).

95. The "sliding scale"/clear and present danger standard" is "notoriously amorphous" and was originally developed in subsequent punishment cases. Schmidt, *Nebraska Press Association: An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431, 459-60 (1977). See also T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 114-15 (1970).

96. Some commentators argue that the *Nebraska Press* decision outlaws any prior restraints in the fair trial context because the nature and extent of pretrial publicity can never be proven, a finding of no available alternatives is difficult to reach, and a prior restraint order is ineffective because it fails to bind media organizations outside the court's jurisdiction. Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of Nebraska Press Association v. Stuart*, 29 STAN. L. REV. 497, 497-503 (1977). This argument is questionable in light of the analytical differences between the opinions of Justices Burger and Brennan in *Nebraska Press*. Although Burger indicated that a restrictive order might be constitutional in some fair trial situations, 427 U.S. at 558, Brennan argued that a prior restraint is never appropriate in such cases. *Id.* at 572-73 (Brennan, J., concurring in the judgment).

97. See text accompanying note 49 *supra* (listing factors).

without question the trial judge's assertion that "the likelihood of jeopardy to a fair trial is overwhelmingly established." ⁹⁸ The assumption that publicity is prejudicial is necessarily speculative and, as the dissent notes, "nothing in the record" supports the trial judge's conclusion.⁹⁹

The court's treatment of the second factor, the effectiveness of alternatives, is inadequate and provides little guidance for trial judges.¹⁰⁰ Although these alternatives may have drawbacks, they can be effectively used in many situations to protect the defendant's rights.¹⁰¹ In *Nebraska Press*, the United States Supreme Court noted that the Nebraska trial court had made no findings concerning the efficacy of alternatives and stated that such alternatives are favored.¹⁰² This statement, combined with the necessarily speculative nature of any finding that the alternatives would not work, indicates that alternatives should be tried before a restrictive order is issued.¹⁰³ The Washington court's preference for the imposition of "reasonable conditions" on attendance, and its speculative dismissal of the effectiveness of other alternatives, may encourage trial judges to ignore or discount the alternatives as a viable means of protecting against prejudicial publicity.

The third prong of the *Nebraska Press* test requires the court to determine whether the restrictive order sought would effectively prevent the threatened danger.¹⁰⁴ Like the extent of the publicity, the effectiveness of the order in preventing harm was speculative. The order applied only to the members of the media, and only to those members acting in a professional capacity.¹⁰⁵ Because any member of the general public could have

98. 96 Wn. 2d at 28, 633 P.2d at 82 (Dolliver, J., dissenting) (quoting the trial court).

99. *Id.* at 27, 633 P.2d at 82 (Dolliver, J., dissenting).

100. See note 70 *supra*.

101. It is difficult to imagine a case involving greater prejudicial publicity than *Sheppard v. Maxwell*, 384 U.S. 333 (1966), yet the Supreme Court stated there that such alternatives would have been sufficient to protect *Sheppard's* rights. *Id.* at 363.

102. 427 U.S. 539, 563-66 (1976).

103. Indeed, one scholar believes that the "Supreme Court's apparent confidence that the alternatives would prove adequate suggests that the Court has gone further and announced a virtual bar to prior restraints on reporting of news about crime." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-11, at 627 (1978); see also Prettyman, *Nebraska Press Association v. Stuart: Have We Seen the Last of Prior Restraints on the Reporting of Judicial Proceedings?*, 20 ST. LOUIS L.J. 654, 658 (intention of *Nebraska Press* Court was to require the use of alternatives other than prior restraints) (1976).

Courts may also attempt to use innovative alternatives in a case involving prejudicial publicity. See *Commonwealth v. Hayes*, 489 Pa. 419, 414 A.2d 318, 324 (supporting sequestration of jury before pretrial hearing), *cert. denied*, 449 U.S. 992 (1980).

104. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976).

105. *Swedberg*, 96 Wn. 2d at 15, 633 P.2d at 74. See Chief Justice Burger's discussion in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 797-802 (1978), regarding the significance of the Press Clause. The Chief Justice stated that the Press Clause conferred no "special status to a limited group," noting the definitional problems involved in determining what institutions would be considered "Press." *Id.* at 801.

attended the hearing and reported the events to a newspaper, the order could be easily circumvented. Thus, the order fails to satisfy the *Nebraska Press* test and fails to overcome the heavy presumption against the constitutional validity of a prior restraint.¹⁰⁶

3. *The Trial Court's Use of the Bench-Bar-Press Guidelines*

Even assuming that some type of constitutional gag order could have been issued, the trial court's order incorporating the Guidelines was unconstitutionally vague. The void-for-vagueness doctrine invalidates laws that lack sufficient clarity to provide the notice required by the due process clause.¹⁰⁷ Because the Bench-Bar-Press Guidelines were designed as voluntary rules, they purposefully lack the specificity of mandatory statutes or regulations. The statement that "the publication of [certain] information should be carefully reviewed"¹⁰⁸ fails to give a precise indication of either the prohibition or the consequences of publication.

In *Nebraska Press Association v. Stuart*, Justice Blackmun stayed the portion of the order that incorporated the Nebraska Bar-Press Guidelines.¹⁰⁹ He described the Guidelines as "vague and indefinite," and stated that they failed to provide "the substance of a permissible court order in the First Amendment area."¹¹⁰ Judge Swedberg's order was similarly unsatisfactory.

B. *The Ramifications of Swedberg: The Resulting Use-Access Tradeoff*

In *Swedberg*, the Washington Supreme Court significantly reduced the right of access to criminal trials. The court recognized the right of the press to attend the proceeding, but granted that right only if the press agreed to curtail its use of the information divulged. Because the court

106. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558 (1976). See notes 43-47 and accompanying text *supra* (discussing presumption against prior restraint).

107. U.S. CONST. amend. V; U.S. CONST. amend. XIV. See generally Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) (overview of the void-for-vagueness doctrine).

108. BENCH-BAR-PRESS GUIDELINES, *supra* note 4, at 5.

109. 423 U.S. 1327, 1330-31 (1975). Justice Blackmun reviewed the district court's restrictive order in his capacity as a Circuit Justice. *Id.*

110. *Id.* at 1331. For example, the Nebraska Bar-Press Guidelines state that "[i]t is appropriate to disclose and report the following information: 1. The arrested person's name, age, residence, employment, marital status and similar biographical information." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 614 (1976). The Washington Guidelines list the identical information as "appropriate to make public." BENCH-BAR-PRESS GUIDELINES, *supra* note 4, at 4. The general structures of the guidelines in Washington and Nebraska are substantially similar.

cannot restrain the use of information in this context,¹¹¹ it was forced to characterize the restriction as one on access. Forcing the press to trade its right to use information as it chooses for access to court proceedings is unacceptable. It infringes free speech without necessarily safeguarding the defendant's right to a fair trial.

This tradeoff fails to safeguard the defendant's right to a fair trial for two reasons. First, the *Swedberg* approach is self-contradictory. Although it approved incorporating the Bench-Bar-Press Guidelines into a court order, the court indicated in dictum that it probably would not have held the newspaper in contempt for violating the order, noting that contempt in this situation would "be contrary to the spirit and intent of the Bench-Bar-Press Guidelines."¹¹² This is consistent with the court's interpretation of the agreement as voluntary, but ignores the media's inability to predict this result. Because publication probably would not result in contempt, the trial court's order is unenforceable and cannot prevent the publication of prejudicial publicity. The *Swedberg* decision, upholding such an ineffectual order, only increases the antagonism between the media and the bench, a result the Guidelines seek to avoid.¹¹³

Second, the order could be easily circumvented because it applied only to reporters acting in their professional capacity. The professional/non-professional dichotomy is a highly questionable categorization,¹¹⁴ and it also fails to force compliance with the Guidelines.¹¹⁵ Thus, the tradeoff imposed by *Swedberg* contradicts first amendment principles and is ineffectual.

C. An Alternative Approach

Trial court orders that restrict the use of information from open court

111. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 568 (1976). See note 11 *supra* (listing cases holding that restrictions may not be imposed on information divulged in open court).

112. 96 Wn. 2d at 21–22, 633 P.2d at 78.

113. The adoption of the Bench-Bar-Press Guidelines by Washington was considered progressive. See AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 29 (1967). Following the *Swedberg* decision, the Seattle Post-Intelligencer, Allied Daily Newspapers, Washington Newspaper Publishers Association, and Washington State Association of Broadcasters withdrew their formal support for the Guidelines. The Post-Intelligencer and Allied Daily Newspapers issued statements that their withdrawal was not a repudiation of the spirit and substance of the guidelines but a reaction to the prior restraint upheld in *Swedberg*. Seattle Post-Intelligencer, Apr. 23, 1982, at B12, col. 1. The Bench-Bar-Press Committee has asked Donald Pember, a University of Washington communications professor, to draft new principles omitting the word "guidelines" and stressing their voluntary nature. Miletich, *Courts, Media Clash Over Criminal Trial Publicity*, Seattle Post-Intelligencer, Mar. 21, 1982, at B8, col. 1.

114. See note 105 *supra* (press entitled to no greater rights than public).

115. See text accompanying notes 105–06 *supra*.

proceedings should be rejected as prior restraints. Although prior restraint analysis may be criticized,¹¹⁶ the prior restraint approach protects the press and should be applied to invalidate such orders. The collateral bar rule also should be rejected in this context.¹¹⁷ The media should not lose constitutional defenses simply because a court finds an order erroneous rather than void on its face.

Courts should close proceedings only in limited circumstances, and only after carefully evaluating the alternatives. Because prior restraints are generally unconstitutional, closure orders may be the only means of assuring that prejudicial information will not reach and perhaps unalterably affect potential jurors. Closure, however, is in many ways the equivalent of a prior restraint. Procedurally, closure may be equivalent because an exclusionary order is often entered without procedural safeguards and, under the collateral bar rule, is enforceable by a subsequent contempt proceeding without regard to the merits of the order. Substantively, closure is equivalent to a prior restraint because the exclusionary order limits the dissemination of information.¹¹⁸ Thus, closure orders may be as offensive as prior restraints. The use of closure orders should be severely limited.

The Washington Supreme Court recently recognized the need for a careful evaluation of the alternatives to closure in *Seattle Times Co. v. Ishikawa*.¹¹⁹ This case may indicate a welcome movement towards a more thorough treatment of alternatives. The ultimate responsibility for protecting the defendant's right to a fair trial lies with the trial judge. The trial judge may find, in some circumstances, that only closure will protect

116. See Barnett, *supra* note 53. Professor Barnett argues that the doctrine of prior restraint is undermined when the collateral bar rule does not apply. *Id.* at 557. Arguably, a gag order has a greater deterrent impact than a subsequent punishment only because the violator "may be assured of being held in contempt." A. BICKEL, *THE MORALITY OF CONSENT* 61 (1975). If the collateral bar rule is inapplicable, the press does not lose its constitutional defenses by disobeying the order, and the inhibition on speech is the same as in a subsequent punishment case. Barnett, *supra* note 53, at 557. See also Rendleman, *Restrictive Orders after Nebraska Press*, 67 KY. L.J. 775, 897-98 (1978-79) (the "prior restraint" label allows courts to use the doctrine as a "subterfuge to decide in favor of particular speech without adjudicating whether parallel civil or criminal law is valid" and to "manipulate results by affixing labels"). But see Blasi, *supra* note 53. Blasi argues that the presumption against prior restraints is supportable even in the absence of the collateral bar rule. *Id.* at 69-85.

117. See discussion at § IB2 *supra*. Allowing collateral attack in these situations is important because restrictive orders are often issued immediately before the planned publication, leaving the enjoined party with no adequate remedy. *State ex rel. Superior Court v. Sperry*, 79 Wn. 2d 69, 74, 483 P.2d 608, 611, *cert. denied*, 404 U.S. 939 (1971). Allowing collateral attack will not significantly reduce compliance with lawful orders because the publisher "still faces a substantial risk of criminal penalties if proved wrong in collateral, rather than direct, attack on the decree's validity." *Id.* (quoting Note, *Defiance of Unlawful Authority*, 83 HARV. L. REV. 626, 635 (1970)). See also *In re Halkin*, 598 F.2d 176, 184 n.15 (D.C. Cir. 1979) (critique of collateral bar rule).

118. See generally 2 J. CHOPER, Y. KAMISAR & L. TRIBE, *supra* note 27, at 184-89 (discussing distinction between prior restraints and exclusionary orders).

119. 97 Wn. 2d 30, 640 P.2d 716 (1982).

the defendant's rights. Nevertheless, closure orders should not issue unless the court follows well defined procedures that provide the media an opportunity to object,¹²⁰ and closure orders should be designed as narrowly as possible to accomplish their purpose.¹²¹ The trial judge should carefully evaluate all possible alternatives.¹²²

IV. CONCLUSION

The problem faced by the trial court in *Swedberg* is central to the fair trial-free press conflict. The conflict has grown along with the recognition of a public right to attend proceedings. In *Swedberg*, the Washington Supreme Court erroneously characterized a prior restraint as a reasonable access restriction. The result increased the antagonism between the bench and the media without necessarily increasing protection of the defendant's right to a fair trial. After *Swedberg*, the court established procedures for trial courts to follow before shutting their doors to the press. These procedures should be carefully followed. The right of access should mean that the government, "even, perhaps, at some inconvenience or cost to itself,"¹²³ must take affirmative steps to protect both the rights of the defendant and of the public.

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120. These procedures are set forth in *Seattle Times Co. v. Ishikawa*, 97 Wn. 2d at 37-39, 640 P.2d at 720-21. See also notes 37-42 and accompanying text *supra* (listing procedures).

121. *Federated Publications, Inc. v. Kurtz*, 94 Wn. 2d 51, 64, 615 P.2d 440, 447 (1980).

122. Judges should not overlook the possibility of impanelling and sequestering the jury before the pretrial hearing. See *Commonwealth v. Hayes*, 489 Pa. 419, 414 A.2d 318, 324, *cert. denied*, 449 U.S. 992 (1980). Although this alternative works a hardship on the jurors and is expensive, these drawbacks should be balanced against the fact that prejudicial publicity poses a threat only in exceptional cases. Recently a King County Superior Court judge decided to select a jury prior to pretrial hearings and permit the media to attend the hearings. *Jury to be Selected Before Hearings in Murder Case*, *Seattle Times*, Oct. 5, 1982, at B2, col. 2.

123. 2 J. CHOPER, Y. KAMISAR & L. TRIBE, *supra* note 27, at 277.